

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6072

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONNA LEARY, JAMES LEARY, BERNICE HENRIKSEN, MARY JANE WAGNER, CHARLES SMITH, FRANCES AGNELLO, JOSEPH PARELLA, WILLIE MATHIS, individually and on behalf of all others similarly situated; PHOENIX UNLIMITED, an unincorporated association,

Plaintiffs - Appellants,

-vs-

HETTY JEAN CRAPSEY, HAROLD A. SHAY, JAMES WHITE, JOHN J. PETROSSI, DWIGHT VAN DEVATE, THOMAS E. McGRATH, ROBERT D. WATERMAN, WILLIAM E. HANSON, Individually and in their Official Capacity as Commissioners of the Rochester-Genesee Regional Transportation Authority; JOHN GARRITY, Individually and in his official Capacity as Resident Manager of the Regional Transit Service, Inc.; WILLIAM T. COLEMAN, JR., individually and in his Capacity as Secretary of the United States Department of Transportation; ROBERT E. PATRICELLI, individually and in his Capacity as Administrator of the United States Urban Mass Transportation Administration; and their agents, employees, successors in office, assistants and all persons acting in concert or cooperation with them or at their direction or under their control,

Defendants - Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

MONROE COUNTY LEGAL ASSISTANCE
CORPORATION
PETER D. BRAUN, ESQ. of Counsel
MARIANNE ARTUSIO, ESQ., of Counsel
80 West Main Street
Rochester, New York 14614
Tel. No. (716) 325-2520
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

	Page
Statement of Issues Presented.	1
Statement of the Case	2 - 4
Argument	
Point I: The Complaint States a Cause of Action on Behalf of Mobility- Handicapped Persons Denied Access to the Public Transportation System.	5
(A) Section 504 of the Rehabili- tation Act of 1973 Confers a Private Right of Action Upon Plaintiffs.	5 - 14
(B) Section 16 of the Urban Mass Transportation Act Confers a Private Right of Action Upon Plaintiffs.	15 - 21
(C) 42 U.S.C. §1983 Confers Upon Plaintiffs a Right of Action to Redress Violations of Federal Rights.	22 - 25
Point II: This Action is Not Barred by the Doctrine of Primary Jurisdiction or the Plaintiffs' Failure to Exhaust Administrative Remedies.	26 - 31
Point III: This Action is Not Barred by the Doctrine of Laches.	32 - 33
Point IV: Summary Judgment Should Not be Granted Where There Are Genuine Issues of Material Fact in Dispute	34 - 38
Conclusion	39

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>American Federation of Government Employees v. Resor</u> , 442 F. 2d 993 (3rd Cir. 1971)	29
<u>American Manufactures Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.</u> , 388 F. 2d 272 (2nd Cir. 1967).	35
<u>Baker v. Carr</u> , 669 U.S. 186 (1962).	22
<u>Bartels v. Biernat</u> , 427 F. Supp. 226 (E.D. Wis. 1977)	7, 31
<u>Bomar v. Keys</u> , 162 F. 2d 136 (2d Cir. 1947) cert. denied, 332 U.S. 825 (1947)	23
<u>Brennan v. Corning Glass Works</u> , 480 F. 2d 1254 (3rd Cir. 1973), reversed on other grounds, 417 U.S. 188 (1974)	16
<u>Brown v. Lynn</u> , 385 F. Supp. 986 (N.D. Ill. 1974).	17
<u>Brown v. Weinberger</u> , 417 F. Supp. 1215 (D.D.C. 1976)	11
<u>Cali v. Eastern Airlines</u> , 442 F. 2d 65 (2d Cir. 1971)	36
<u>Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission</u> , 449 F. 2d 1109 (D. C. Cir 1971)	17, 21
<u>Cort v. Ash</u> , 422 U.S. 66 (1975).	7, 19
<u>Curry v. Continental Airlines</u> , 513 F. 2d 691 (9th Cir. 1975).	11
<u>Damico v. California</u> , 389 U.S. 416 (1967).	28
<u>Davis v. Romney</u> , 355 F. Supp. 29 (E.D. Pa. 1973), remanded on other grounds, 490 F. 2d 1360 (3rd Cir. 1974).	17
<u>Diapulse Corp. v. Food and Drug Administration of Department of Health, Education and Welfare</u> , 500 F. 2d 75 (2d Cir. 1974).	27, 28
<u>Doe v. Bolton</u> , 410 U.S. 179 (1973).	22

Cases (cont'd.)

<u>Ecology Center of Louisiana v. Coleman,</u> 515 F. 2d 860 (5th Cir. 1975)	33
<u>Edelman v. Jordan,</u> 415 U.S. 651 (1974)	23
<u>Eisen v. Eastman,</u> 421 F. 2d 560 (2d Cir. 1969) cert. denied, 400 U.S. 841 (1970)	23
<u>Finney v. Hutto,</u> 548 F. 2d 740 (8th Cir. 1977)	23
<u>Fitzgerald v. Hampton,</u> 467 F. 2d 755 (D.D.C. 1972).	29
<u>Fri v. Sierra Club,</u> 412 U.S. 541 (1973)	18
<u>Friedman v. Meyers,</u> 482 F. 2d 435 (2d Cir. 1973).	36
<u>Gartner v. Soloner,</u> 384 F. 2d 348 (3rd Cir. 1967) cert. denied, 390 U.S. 1040 (1968)	16
<u>Goger v. H. K. Porter Company, Inc.,</u> 492 F. 2d 13 (3rd Cir. 1974).	11
<u>Gomez v. Florida State Employment Service,</u> 417 F. 2d 569 (5th Cir. 1969).	23
<u>Gonzalez v. Shanker,</u> 399 F. Supp. 858 (S.D.N.Y. 1975).	25
<u>Gurmankin v. Costanzo,</u> 411 F. Supp. 982 (E.D. Pa. 1976); aff'd. on other grounds, 45 U.S. Law Week 2526 (3rd Cir. 1977)	7
<u>Hairston v. Drosick,</u> 423 F. Supp. 180 (S.D.W.Va. 1976).	7
<u>Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.,</u> 53 F.R.D. 691 (S.D.N.Y. 1971).	37
<u>Heyman v. Commerce and Industry Insurance Co.,</u> 524 F. 2d 1317 (2d Cir. 1975).	34, 35
<u>Hill v. A-T-O, Inc.,</u> 535 F. 2d 1349 (2d Cir. 1976)	36
<u>Holley v. Lavine,</u> F.2d __, No. 76-7588 (2d Cir. April 27, 1977)	23

Cases (cont'd.)

<u>Houghton v. Shafer</u> , 392 U.S. 639 (1968)	28
<u>Illinois State Employees Union v. Lewis</u> , 473 F. 2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973).	37
<u>Jaroslawicz v. Seedman</u> , 528 F. 2d 727 (2d Cir. 1975).	35
<u>Judge v. City of Buffalo</u> , 524 F. 2d 1321 (2d Cir. 1975).	34
<u>Kampmeier v. Nyquist</u> , F. 2d , No. 76-7383 (2d Cir. April 15, 1977)	7,14,24
<u>King v. Smith</u> , 392 U.S. 309 (1968).	28
<u>Kirby v. Blackledge</u> , 530 F. 2d 583 (4th Cir. 1976) . .	37
<u>Kletschka v. Driver</u> , 411 F. 2d 436 (2d Cir. 1969). . .	25
<u>Lau v. Nichols</u> , 414 U.S. 563 (1974).	6
<u>Lloyd v. Regional Transportation Authority</u> , 548 F. 2d 1277 (7th Cir. 1977)	6,18,19, 20,31
<u>Lugo v. Simon</u> , 428 F. Supp. 28 (N.D. Ohio, 1976) . . .	29
<u>Martinez v. Richardson</u> , 472 F. 2d 1121 (10th Cir. 1973).	29
<u>MCI Communications Corp. v. American Telephone and Tel. Co.</u> , 496 F. 2d 214 (3rd Cir. 1974).	29
<u>McNeese v. Board of Education</u> , 373 U.S. 668 (1963). . .	28
<u>Mintz v. Mathers Fund Inc.</u> , 463 F. 2d 495 (2d Cir. 1972)	34
<u>National Life Insurance Co. v. Solomon</u> , 529 F. 2d 59 (2d Cir. 1975).	34,36
<u>N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America</u> , 391 U.S. 418 (1968)	28
<u>Penn Galvanizing Co. v. Lukens Steel Company</u> , 59 F.R.D. 74 (E.D. Pa. 1973).	37
<u>Plano v. Baker</u> , 504 F. 2d 595 (2d Cir. 1974)	28

Cases (cont'd.)

<u>Rhoads v. McFerran</u> , 517 F. 2d 66 (2d Cir. 1975)	36
<u>Ricci v. Chicago Merchantile Exchange</u> , 409 U.S. 289 (1973), reh. denied, 410 U.S. 960 (1973)	29
<u>Roe v. Wade</u> , 410 U.S. 113 (1973), reh. denied, 410 U.S. 959 (1973).	22
<u>Rosado v. Wyman</u> , 397 U.S. 397 (1970)	23,31
<u>Sierra Club v. Ruckleshaus</u> , 344 F. Supp. 253 (D.D.C. 1972), aff'd., 412 U.S. 541 (1973).	18
<u>Sites v. McKenzie</u> , 423 F. Supp. 1190 (N.D.W.Va. 1976)	7
<u>Smith-Corona Marchant, Inc. v. American Photocopy Equipment Company</u> , 217 F. Supp. 39 (S.D.N.Y. 1963)	37,38
<u>Sterling National Bank & Trust Co. of New York v. Fidelity Mortgage Investors</u> , 510 F. 2d 870 (2d Cir. 1975).	36
<u>Super Tire Engineering Company v. McCorkle</u> , 416 U.S. 115 (1974).	30
<u>Udall v. Tallman</u> , 380 U.S. 1 (1965)	14
<u>U.S. v. Diebold, Inc.</u> , 369 U.S. 654 (1962)	36
<u>U.S. v. Donahue</u> , 539 F. 2d 1131 (8th Cir. 1976)	11
<u>Warth v. Seldin</u> , 422 U.S. 490 (1975)	22
<u>Weisman v. Lelandis</u> , 532 F. 2d 308 (2d Cir. 1976)	25

Statutes

5 U.S.C. §702	29
29 U.S.C. §791	12
29 U.S.C. §792	12
29 U.S.C. §793	12

Statutes, (cont'd.)

29 U.S.C. §794	2,5,7,8
42 U.S.C. §601	23
42 U.S.C. §1441	18
42 U.S.C. §1857	18
42 U.S.C. §1983	2,22
42 U.S.C. §1988	23
42 U.S.C. §2000d-1	6
42 U.S.C. §4331	17
49 U.S.C. §1601	2
49 U.S.C. §1612	15

Regulations

23 C.F.R. Part 450	19
49 C.F.R. §613.204	18

Other Authorities

6 Moore's Federal Practice #56.15[5]. . .	37
Federal Rules of Civil Procedure, Rule 56(c)	33,34
116 Cong. Rec. 34180 (1970) ,	16
117 Cong. Rec. 45945 (1971)	8
118 Cong. Rec. 525-526 (1972)	8
120 Cong. Rec. S 16198 (1974)	9

Other Authorities (cont'd.)

120 Cong. Rec. S 18879 (1974); S. Rep. 93-1297; 4 U.S.C.C. & A.N. 6373, 6388-91 (1974)	10
41 Fed. Reg. 16147 (1976).	12
41 Fed. Reg. 17871 (1976)	14
42 Fed. Reg. 22676 (1977)	14
S. Rep. No. 93-1139, 93d Cong., 2nd Sess. (1974)	9
S. Rep. No. 93 1270, 93d Cong., 2nd Sess. (1974)	9
H. Rep. No. 93-1457, 93d Cong., 2nd Sess. (1974)	9
 Burgdorff and Burgdorff, "A History of Unequal Treatment: The Qualifications of Handicapped Persons As a Suspect Class Under the Equal Protection Clause", 15 Santa Clara Lawyer 855 (1975)	 25
Comment, "The Forgotten Minority: The Physically Disabled and Improving Their Environment", 48 Chicago-Kent L. Rev. 215 (1971)	24
Gunther, "Foreward: In Search of Evolving Doctrine On a Changing Court: A Model For a Newer Equal Protection", 86 Harv. L. Rev. 1 (1972)	25
Note, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled", 61 Geo. L.J. 1501, 1506-1509 (1973).	24

STATEMENT OF ISSUES PRESENTED

1. Does the complaint state a cause of action on behalf of mobility-handicapped persons denied access to the mass transportation system?
2. Is the instant action barred by the doctrine of primary jurisdiction or the alleged failure to exhaust administrative remedies when no adequate administrative remedies are available to the plaintiffs?
3. Is the instant action barred by the doctrine of laches?
4. Was summary judgment properly granted to defendants where material issues of fact were disputed?

STATEMENT OF THE CASE

The plaintiffs commenced this action for declaratory and injunctive relief on behalf of mobility-handicapped individuals challenging the failure of the defendants to provide an accessible transportation system. Specifically, the plaintiffs allege that the defendants, in denying them access to transportation services, have violated the provisions of the Urban Mass Transportation Act, as amended, 49 U.S.C. §1601, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. §794; the Civil Rights Act of 1871, 42 U.S.C. §1983; and the Fifth and Fourteenth Amendments to the United States Constitution.

The action was commenced on July 2, 1976 by filing the complaint, together with a notice to take deposition [A.6-27]¹. By order to show cause dated July 29, 1976, Judge Harold Burke restrained plaintiffs from taking the deposition until the court ruled on defendants' subsequent motion to dismiss the complaint and/or for summary judgment. On September 13, 1976, both the local defendants (commissioners and officials of the Rochester-Genesee Regional Transportation Authority and the Regional Transit Service) and the federal defendants (the Secretary of Transportation and the Administrator of the Urban Mass Transportation Administration)

1.

Numerals in [] refer to pages in the Appendix.

moved to dismiss the complaint, or in the alternative, for summary judgment[A.28;181]. Thereafter, finding that the defendants had not violated any federal statutory or constitutional provisions, and holding that the action was barred by the doctrines of laches, primary jurisdiction, and failure to exhaust administrative remedies, Judge Burke, by an order and decision dated March 31, 1977, granted summary judgment to defendants, dismissing the action in its entirety [A.209]. Plaintiffs were thus never able to take the deposition or conduct any other discovery. On April 25, 1977, plaintiffs filed their notice of appeal.

The individual plaintiffs are people suffering from severe physical handicaps. Seven of the eight individuals are confined to wheelchairs, having been afflicted with such disabilities as muscular dystrophy, cerebral palsy, multiple sclerosis, and polio. The other plaintiff suffers from paralysis of her legs, and can only ambulate with the use of crutches and full leg braces. Plaintiff Phoenix Unlimited is an unincorporated association composed exclusively of physically handicapped persons which is dedicated to advocating for the rights of the handicapped. Because of the severe nature of their respective handicaps, and because the defendants have refused to provide accessible buses, the individual plaintiffs have been unable to utilize the local

transit system. As a result, the plaintiffs and other mobility-handicapped individuals have been precluded from attending cultural events or religious services, participating in or attending governmental, social, or recreational activities, or even going to stores, art galleries, or libraries.

The plaintiffs contend that the defendants have a federal statutory and constitutional obligation to provide a transit system which serves and which is accessible to mobility-handicapped people, and that the federal officials have an obligation to assure that federal funds are utilized to assure such a transportation system. It is the failure of the defendants to provide such a system that plaintiffs challenge herein.

ARGUMENT

POINT I

THE COMPLAINT STATES A CAUSE OF ACTION ON BEHALF OF MOBILITY-HANDICAPPED PERSONS DENIED ACCESS TO THE PUBLIC TRANSPORTATION SYSTEM.

A. Section 504 of the Rehabilitation Act of 1973 Confers a Private Right of Action Upon Plaintiffs.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, prohibits recipients of federal funds from discriminating against handicapped people:

"No otherwise qualified handicapped individual in the United States. . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance".

It is undisputed that the plaintiffs are handicapped and, similarly, that they have been denied access to the transit system in Monroe County solely by reason of their handicaps. Moreover, it is undisputed that the local defendants are recipients of federal financial assistance under the Urban Mass Transportation Act. Therefore, the central issue is whether Section 504 of the Rehabilitation Act creates a private right of action, and if so, does it confer such a right of action upon plaintiffs.

The Seventh Circuit Court of Appeals was recently faced with virtually and identical question in Lloyd v.

Regional Transportation Authority, 548 F. 2d 1277 (1977).

In that case, the physically handicapped plaintiffs asserted that the defendant transit authorities had violated Section 504 by denying them meaningful usage of the public mass transportation system. Finding that Section 504 closely tracked Section 601 of the Civil Rights Act of 1964,² which was construed by the Supreme Court in Lau v. Nichols, 414 U.S. 563 (1974),³ as providing a private cause of action, the court in Lloyd held that Section 504 conferred a private right of action upon the plaintiffs.

"Because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964, Lau is dispositive. Therefore, we hold that Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed".
Id., at 1281.

2.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1 provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance".

3.

In Lau, the Supreme Court held that the San Francisco School system's failure to provide English language instruction to Chinese-speaking students violated the anti-discrimination provisions of Section 601 of the Civil Rights Act of 1964.

A similar result was reached in Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977). Holding that Section 504 created a cause of action, the court in Bartels concluded that:

"Defendant members of the [transit company], by operating a mass transit system which is currently effectively inaccessible to mobility handicapped individuals and by attempting to purchase one hundred new effectively inaccessible buses so as to knowingly exclude mobility handicapped individuals from participating in the benefits of the federally assisted mass transit program in Milwaukee County, have violated the non-discrimination rights of mobility handicapped persons as declared in 29 U.S.C. §794".
Id., at 231.

Moreover, this Court has recently held in Kampmeier v. Nyquist, ___ F. 2d ___, No. 76-7383 (2nd Cir. April 15, 1977), that Section 504 creates a private right of action. Finding the reasoning in Lloyd "persuasive", the Court determined that the blind plaintiffs "do have standing to sue; they are the people in the best position to enforce §504, which is designed specifically for their protection". Slip op. at 2958. Accord, Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976); aff'd. on other grounds, 45 U.S. Law Week 2526 (3rd Cir. 1977); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W.Va. 1976); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W.Va. 1976); Cf., Cort v. Ash, 422 U.S. 66 (1975).⁴

4. The standards set forth in Cort for determining whether a private remedy is implicit in a statute not expressly providing one are discussed infra at pp. 19-20.

The legislative history of the Rehabilitation Act, 29 U.S.C. §794, et seq., clearly refutes the defendants' claim that Section 504 does not create a private right of action. Section 504 originated as legislation to include, within the scope of Title VI of the Civil Rights Act of 1964, prohibitions against discrimination on the basis of handicap.⁵ The transfer of the proposed Section 504 to other pending legislation relating to a reorganization of the federal rehabilitation program was approved by Senator Humphrey,⁶ who along with Senator Percy introduced the legislation, and the anti-discrimination provision eventually became part of the Rehabilitation Act of 1973.

The most complete exposition of Congressional intent in respect to Section 504 occurred in 1974, after Section 504 was enacted, but during Congressional consideration of major amendments to the Rehabilitation Act. Congress was

5. Congressman Vanik introduced H.R. 12154 on December 9, 1971, 117 Cong. Rec. 45945 (1971). Senators Humphrey and Percy introduced S. 3044 on January 20, 1972, 118 Cong. Rec. 525-526 (1972).

6. 118 Cong. Rec. 32310 (1972)

concerned, as it has continued to be concerned,⁷ that the anti-discrimination provisions of the Rehabilitation Act (of which Section 504 is only one)⁸ were not being properly enforced by the Executive Branch. In addition to appearing in the Congressional debates on the amendments, the following language is contained in a committee report accompanying P.L. 93-516, considering amendments to the Rehabilitation Act.

"Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs. . .

7. In the last session of Congress the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare conducted oversight hearings on the implementation of the Rehabilitation Act. Those hearings resulted in over 1500 pages of testimony and other material. Hearings Before Subcommittee on the Handicapped on the Committee on Labor and Public Welfare on Oversight Hearings on the Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies under the Rehabilitation Act of 1973, 94th Cong., 2d Sess. (1976), (Hereafter Oversight Hearings).

8. See pages 12, 13, infra.

See also, S. Rep. No. 93-1270, 93d Cong., 2nd Sess. 25, 27 (1974); S. Rep. No. 93-1139, 93d Cong., 2nd Sess. 24-25 (1974); H.R. Rep. No. 93-1457, 93d Cong. 2nd Sess. 25, 27 (1974); 120 Cong. Rec. S16198 (daily ed. Sept. 10, 1974).

The section was patterned after, and is almost identical to, the anti-discrimination language of §601 of the Civil Rights Act of 1964, . . . and §901 of the Education Amendments of 1972. . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form and such regulations and enforcement were intended by this Committee and by Congress.

The language of Section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provisions, would insure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and also permit a judicial remedy through a private action". [Emphasis added]. 120 Cong. Rec. S. 18879 (Oct. 10, 1974); S. Rep. 93-1297; 4 U.S.C. & A.N. 6373, 6388-91 (1974).

The similarity of Section 504 to Title VI, and its legislative history, clearly indicate that not only did Congress intend to create a private cause of action, but also that the provisions of the Rehabilitation Act were

mandatory obligations imposed on recipients of Federal funds. A statute patterned on another comparable statute may be construed in pari materia. U.S. v. Donahue, 539 F. 2d 1131, 1135 (8th Cir. 1976); Curry v. Continental Airlines, 513 F.2d 691 (9th Cir. 1975); Goger v. H.K. Porter Company, Inc., 492 F.2d 13 (3rd Cir. 1974). Interpreting the similar language of Title VI, Judge John Sirica of the United States District Court for the District of Columbia has succinctly summed up the Congressional purpose underlying Title VI:

"The intent of Congress is quite clear: to root out discrimination by cutting off Federal funds to those activities which continue to discriminate contrary to the mandate of Title VI". Brown v. Weinberger, 417 F. Supp. 1215, 1221 (D.D.C. 1976).

From the time the Rehabilitation Act became law until the last session of Congress, Congress has manifested a continual concern that the Rehabilitation Act be enforced effectively. In 1976, the Senate Sub-Committee on the Handicapped of the Committee on Labor and Public Welfare conducted oversight hearings on implementation of the Rehabilitation Act of 1973. Oversight Hearings, supra, n.8. These hearings revealed urgent concerns on the part of members of Congress that Section 504 be enforced actively and aggressively, e.g. testimony of Martin H. Gerry, Director of

the Office for Civil Rights, and questions of Senator Harrison A. Williams, Id., at 1510-1525. Members of Congress had earlier expressed concern that the Department of Health, Education and Welfare was not properly enforcing Section 504. Hearing Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 3108 and H.R. 14225, 93rd Cong., 2nd Sess. 317-320 (1974).

A further indication that Congress intended Section 504 to be a mandatory provision imposing legal obligations on recipients of federal funds is in the statutory scheme of which Section 504 is a part. The preceding section, Section 503, 29 U.S.C. §793, imposes affirmative action requirements in the hiring of handicapped workers on federal contractors who hold contracts in excess of \$2500. This provision is enforced by the Department of Labor, and final implementing regulations were promulgated at 41 Federal Register 16147 (April 16, 1976). Section 502, 29 U.S.C. §792, created the Architectural and Transportation Barriers Compliance Board, which has among its functions the obligation to insure compliance with federal statutes prohibiting architectural barriers in certain circumstances in federal building projects. Section 501, 29 U.S.C. §791, imposes on Executive departments and agencies the obligation to take affirmative action in the hiring and promotion of handicapped federal employees.

It is apparent that these provisions, taken together, constitute a civil rights act for the handicapped, and that the provisions are to be enforced in a manner similar to other civil rights legislation.

The legislative history of the Rehabilitation Act thus indicates that Congress envisioned that services such as public transportation be available to all handicapped persons. The defendants' current system entails only limited, fixed destination transportation services to the handicapped in two suburban communities [A. 16]; it does not even attempt to meet the transportation needs of the plaintiffs. The minimal service provided by the defendants, and the concomitant virtually inaccessible public transportation system does not satisfy the full service required under the Rehabilitation Act. The plaintiffs are clearly aggrieved by the defendants' system and have stated a cause of action under Section 504.

Moreover, the Secretary of the Department of Health, Education, and Welfare has recently promulgated regulations implementing Section 504. In signing the new regulations, Secretary Califano stated that, "Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap . . . It establishes

a mandate to end discrimination and to bring handicapped persons into the mainstream of American life". 42 Federal Register 22676 (May 4, 1977). [Emphasis added].

The unequivocal language of the Secretary H.E.W. thus reflects the fact that the nondiscrimination provisions of Section 504 are mandatory. And while the current H.E.W. regulations do not specifically allude to discrimination in transportation, under Executive Order 11914, 41 Federal Register 17871, April 28, 1976, H.E.W. is required to issue standards for other federal agencies to follow in promulgating regulations implementing Section 504. The regulations, promulgated to carry out the Congressional purpose underlying the enactment of Section 504, clearly demonstrate that the statute was intended to create enforceable rights for handicapped individuals such as the plaintiffs.⁹ Any notion that Section 504 does not create a private right of action was unequivocally laid to rest by this Court in Kampmeier v. Nyquist, supra.

9. The construction given Section 504 by the agency charged with its administration should be given great deference by the court. See, Udall v. Tallman, 380 U.S. 1, 16 (1965).

B. Section 16 of the Urban Mass Transportation Act Confers a Private Right of Action Upon Plaintiffs.

Plaintiffs also contend that the exclusionary practices of defendants violate the provisions of Section 16 of the Urban Mass Transportation Act (UMTA), 49 U.S.C. §1612. Moreover plaintiffs assert that Section 1612, like Section 504 of the Rehabilitation Act, confers upon them a private right of action. Section 1612 provides, in pertinent part:

"It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions for implementing this policy". [emphasis added].

The legislative history of Section 16 reveals that in guaranteeing "elderly and handicapped persons. . .the same right as other persons to utilize mass transportation facilities and services", Congress intended that buses must be designed so that they are accessible to the mobility-handicapped. Rather than being merely a precatory statute, Section 16 is mandatory. Indeed, Congressman Mario Biaggi,

the chief sponsor of the bill,¹⁰ emphasized that:

"The amendment would require all federally assisted mass transit facilities to meet the needs of the elderly and handicapped. The amendment will also permit a portion of the total authorization to be used for loans and grants to existing systems to make modifications in their facilities. . .

"I cannot overemphasize the importance of establishing a national policy to aid these elderly and handicapped persons so that they might have the same equal right of access to public transportation facilities that other Americans have".
116 Cong. Rec. 34180 (1970). [Emphasis added]

And, following defendant Robert Patricelli's appearance at oversight hearings on the implementation of the Rehabilitation Act of 1973, when amendments to the Federal Aid Highway Act were discussed, Senator Jennings Randolph reiterated the mandatory nature of Section 1612:

"Now in a mandate concerning Section 165(b) of the Federal Aid Highway Act, Congress was going further than the previous statutes merely in the sense that we needed to clarify and emphasize the requirements that were first established in 1970 in the Urban Mass Transportation Act. . . It is my hope and belief of the members of our subcommittee, I think, that UMTA clearly understands its duty

10. Courts have recognized that the statements of a sponsor of a bill concerning its legislative purpose are entitled to great weight. Brennan v. Corning Glass Works, 480 F. 2d 1254, 1260-61 (3rd Cir. 1973), reversed on other grounds, 417 U.S. 188 (1974); Gartner v. Soloner, 384 F. 2d 348, 353 (3rd Cir. 1967), cert. denied, 390 U.S. 1040 (1968).

in providing an accessible mass transit system to handicapped persons".¹¹ [Emphasis added].

Despite the mandatory statutory language of Section 1612, as well as the legislative history, defendants have argued that Section 16 is nothing more than a statement of national policy. However, the use of the work "shall" in the statute, and the command that all mass transit programs "contain provisions implementing" the Congressional objective, impose a mandatory obligation on the defendants.

"The work 'shall' as used in any statute does not confer discretion but rather commands, the same as if the work 'must' were used in its stead". Davis v. Romney, 355 F. Supp. 29 (E.D. Pa. 1973), remanded on other grounds, 490 F. 2d 1360 (3rd Cir. 1974).

Moreover, federal courts have interpreted a number of statutes with language similar in style, as mandatory, enforceable laws. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F. 2d 1109 (D.C. Cir. 1971) (interpreting the National Environmental Policy Act, 42 U.S.C. §4331); Brown v. Lynn, 385 F. Supp.

11. Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies Under the Rehabilitation Act of 1973 Before the Sub-Committee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess., pt. 2, at 756 (1976).

(N.D. Ill. 1974) (interpreting the Housing Act of 1949, 42 U.S.C. §1441); Sierra Club v. Ruckleshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd. per curiam, 4 ERC 1815 (D.C. Cir. 1972), aff'd. per curiam sub. nom. Fri v. Sierra Club, 412 U.S. 541 (1973) (interpreting the Clean Air Act of 1970, 42 U.S.C. §1857).

Furthermore, in August, 1976, the Urban Mass Transportation Administrator promulgated regulations, in part under the authority of Section 504 of the Rehabilitation Act and Executive Order 11914. As the court in Lloyd v. Regional Transportation Authority, supra, noted, "these regulations and various accompanying guidelines are squarely couched in affirmative language". Id., at 1282. Generally the regulations require that the Urban Mass Transportation Administrator's grant approval is contingent on a showing of "special efforts".

"The Urban Mass Transportation Administrator will grant project approval. . . only if:

(a) The Urban Transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons; and

(b) The annual element of the transportation improvement program . . . contains projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semi-ambulatory capabilities. . ."

49 C.F.R. §613.204.

Advisory information of the Urban Mass Transportation Administrator published as an appendix to 23 C.F.R. Part 450, Subpart A, defines the "special efforts" contemplated:

"As used in this guidance, the term 'special efforts' refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semi-ambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, 'special efforts' in planning means genuine, good-faith progress is planning service for wheelchair users and semi-ambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period".

Taken together, the regulations and guidelines reflect an intention to create a private cause of action under Section 16 of the Urban Mass Transportation Act: "While the guidelines do not purport to be regulatory standards or minimums, they do suggest a commitment to an affirmative remedial program of substantial scope". Lloyd v. Regional Transportation Authority, supra, at 1282, 1283.

In Cort v. Ash, supra, at 78, the Supreme Court enunciated four criteria for determining whether a private remedy is implicit in a statute not expressly providing one. First, is the plaintiff a member of a class for whose especial benefit the statute was enacted? Second, is there any indication

of a legislative intent to create or deny such a remedy? Third, is implying such a remedy consistent with the underlying legislative purposes? And fourth, is the cause of action one so traditionally relegated to state law that it would be inappropriate to infer a cause of action based solely on federal law?

It is clear that the plaintiffs have met those criteria in this action. First, plaintiffs, physically handicapped persons, are "of the class for whose especial benefit that statute was enacted", and the statute clearly created "a federal right on favor" of the plaintiffs. Second, there is no indication of legislative intent to deny a private remedy. In fact, one may infer that in the relationship between Section 1612 and Section 504, Congress not only would permit, but would expect, a private remedy to exist. In Lloyd, in determining that a private remedy existed under the Rehabilitation Act, the court relied in part on Section 16 of UMTA and its implementing regulations. Third, given the Congressional purpose of creating civil rights on behalf of handicapped persons, it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy" for the persons specially benefitted. And finally, the cause of action in the instant case is not one traditionally relegated to state law, nor is the subject matter of this litigation so traditionally

the concern of states that it would be inappropriate to infer a cause of action based solely on federal law. Accordingly, this Court should hold that mobility-handicapped persons have a private remedy to enforce their deprivation of rights secured by Section 16 of the Urban Mass Transportation Act. As stated by the Court of Appeals for the District of Columbia in Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, supra, at 1111, the function of the federal court "is to see that important legislative purposes, headed in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy".

C. 42 U.S.C. §1983 Confers Upon Plaintiffs
a Right of Action to Redress Violations
of Federal Rights.

The complaint also alleges that defendants are subjecting plaintiffs to the deprivation of rights secured by both the Constitution and laws of the United States in violation of 42 U.S.C. §1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other property proceeding for redress".

This section of the Civil Rights Act of 1871 (hereinafter referred to as Section 1983) confers upon plaintiffs¹² a civil remedy for the deprivation of rights. Accordingly, even assuming the court finds no authorization for a private civil remedy in Section 16 of UMTA or Section 504 of the Rehabilitation

12. Inasmuch as the claims of Phoenix Unlimited, an unincorporated association, are identical to the claims of the individual plaintiffs, this Court need not rule on the standing of Phoenix. Doe v. Bolton, 410 U.S. 179, 188-189 (1973); Roe v. Wade, 410 U.S. 113, 127 (1973). Moreover, the individual named plaintiffs, physically handicapped individuals who allege that they have been denied access to the transit system, clearly have the requisite standing because they have a "personal stake in the outcome of the litigation". Baker v. Carr, 369 U.S. 186, 204 (1962); Warth v. Seldin, 442 U.S. 490 (1975).

Act, it may hold that the instant action is expressly authorized by Section 1983. See, e.g., Edelman v. Jordan, 416 U.S. 651, 674, 675 (1974); Rosado v. Wyman, 397 U.S. 397, 420 (1970); Gomez v. Florida State Employment Service, 417 F. 2d 569, 578 (5th Cir. 1969).

In this regard the case is indistinguishable from Rosado and Edelman. Plaintiffs there were suing to compel state officials to comply with rights secured by the Constitution and the Social Security Act, 42 U.S.C. §601, et seq. The Court recognized in Edelman that even though the Social Security Act does not explicitly authorize a private enforcement remedy, "suits in federal court under §1983 are proper to secure compliance with the provisions of [that Act]". Id., at 675.

Here, as in Edelman and Rosado, plaintiffs may maintain this lawsuit under Section 1983 to secure compliance with constitutionally and statutorily¹³ mandated rights.¹⁴ That Section 1983

13. It is firmly established that Section 1983 authorizes a civil suit to protect rights secured by either the Constitution or the laws of the United States. Bomar v. Keyes, 162 F. 2d 136 (2d Cir. 1947), cert. denied, 332 U.S. 825 (1947).

14. Although defendants alleged in the lower court that no authority existed for awarding attorneys' fees to the plaintiffs, it is clear that such authority exists pursuant to 42 U.S.C. §1988, and that such statute applies to actions, such as the instant case, pending at the time of its enactment. Finney v. Hutto, 548 F. 2d 740 (8th Cir. 1977); Holley v. Lavine, ___ F. 2d ___, 76-7588 (2d Cir. April 27, 1977).

embraces the claims asserted in the complaint cannot be seriously disputed. It is alleged that defendants are acting under color of state law and are denying plaintiffs rights secured by the laws of the United States -- namely, Section 16 and Section 504. (See discussion supra at Points I,A and I,B).

So too, the complaint alleges that these public officials are depriving plaintiffs of equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution. Plainly, the mobility handicapped, unlike more fortunate able-bodied individuals, are being denied use of the public transportation system.¹⁵ They are as surely denied this public service as if a sign were posted on the door of each bus stating, "Handicapped may not ride". At this stage of the litigation, the Court need not decide whether this classification should be analyzed under the strict scrutiny test. See Kampmeier v. Nyquist, supra, at ___ F. 2d ___, n.8 (Slip Op.

15. See, Note, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled", 61 Geo. L. J. 1501, 1506-1509 (1973);

Comment, "The Forgotten Minority: The Physically Disabled and Improving their Environment", 48 Chicago-Kent L. Rev. 215 (1971).

at 2958 n.8). Assuming that a less stringent test applies¹⁶, the district court nevertheless erred in granting summary judgment on this record. Pretrial discovery and a trial are necessary to determine whether there is even a rational basis for the blanket exclusion of the handicapped from the public transportation system in Monroe County.

In these circumstances, it must be concluded that Section 1983 explicitly authorizes this action to secure defendants' compliance with the constitutional and statutory provisions alleged in the complaint. Moreover, the Court should reject any notion that Section 1983 permits this suit against the local defendants, but not the federal officials. In Kletschka v. Driver, 411 F. 2d 436 (2d Cir. 1969), this Court held that §1983 applies to federal officials who -- as in the instant case -- engage in interrelated activities with state governmental defendants. Cf., Weisman v. LeLandis, 532 F. 2d 308, 311 (2d Cir. 1976); Gonzalez v. Shanker, 399 F. Supp. 858, 868 (S.D.N.Y. 1975) (private parties who act in conjunction with state officials can be held liable under Section 1983). Accordingly, Section 1983 confers upon plaintiffs a right to maintain this action against both the local and federal defendants.

16. But see generally, Burgdorff and Burgdorff, "A History of Unequal Treatment: The Qualifications of Handicapped Persons As a Suspect Class Under the Equal Protection Clause", 15 Santa Clara Lawyer 855, 899-908 (1975); Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv. L. Rev. 1 (1972).

POINT II

THIS ACTION IS NOT BARRED BY THE DOCTRINE
OF PRIMARY JURISDICTION OR THE PLAINTIFFS'
FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The lower court found that the plaintiffs' claims were barred by their failure to exhaust administrative remedies, in that they failed to attend a public hearing. Yet, it can hardly be seriously asserted by defendants that participation in a public hearing constitutes an administrative prerequisite to the plaintiffs' assertion of their claims. The public hearing did not constitute an administrative remedy at all, and certainly did not constitute an administrative step which the plaintiffs should have exhausted prior to commencing this litigation. But even if it did amount to an administrative proceeding, it was at best an inadequate and futile remedy. While the local defendants held such a hearing without the plaintiffs' participation, there is no basis for the district court's conclusion that plaintiffs' absence from such hearing precludes them from raising their statutory and constitutional claims in this litigation. Nowhere do defendants assert that the plaintiffs received actual notice of such a hearing; they merely state that such notice was printed in a local newspaper, hardly a device guaranteed to apprise the plaintiffs or the handicapped community that such a hearing was taking place. An examination of the transcript of the

public hearing [A. 203] reveals that the hearing consisted merely of reading the published notice of the hearing. No person spoke at the hearing and no public comment was received. That being so, it can hardly be claimed that the defendants considered all public views on the application or that the plaintiffs are barred from maintaining this action because all other concerns of the public were adequately incorporated into the application and grant approval.

If the defendants were truly concerned about including the handicapped community in the application process, there was ample opportunity to include them in the process before the decision was made, not at a public hearing taking place after the decision had essentially been made. The local defendants have claimed that they involved the handicapped in the planning process through the ad hoc Committee for Transportation Needs of the Elderly and Handicapped. However, an examination of the minutes of that committee reveals that for nearly two years prior to the public hearing, none of the local defendants ever even mentioned the pending application. [A. 123-139].

In addition, this Court has held that the failure to exhaust administrative remedies does not in itself bar an individual from commencing civil litigation. Diapulse Corp. v. Food and Drug Administration of Department of Health, Education, and Welfare, 500 F. 2d 75 (2d Cir. 1974). In this case, as

in Diapulse , allowing judicial review will not unduly disrupt the scheme of administrative review. In Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), this Court also made it clear that exhaustion of administrative remedies "is not required where the administrative remedy is inadequate. . .or where it is certainly or probably futile". See McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); King v. Smith, 392 U.S. 309 (1968); Houghton v. Shafer, 392 U.S. 639 (1968); N.E.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America, 391 U.S. 418 (1968); Plano v. Baker, 504 F. 2d 595 (2d Cir. 1974).

Thus, as indicated above, the administrative remedy, if any, was at best inadequate and futile to exhaust. Moreover, in view of the federal defendants' approval of the first, similarly inadequate, application, based on their use of an erroneous legal standard, and the decision of the local defendants, subsequent to the public hearing, to amend the second application to delete the request for some vehicles for the handicapped [A. 118], it would indeed be futile for the plaintiffs to participate in the "process" again.

PRIMARY JURISDICTION

For similar reasons, the doctrine of primary jurisdiction does not serve to deny the lower court jurisdiction to hear plaintiffs' complaint concerning the pending application. Defendants alleged that Section 10 of the Administrative Procedure Act, 5 U.S.C. §702, predicates the right to sue on the existence of agency action, and that in this case UMTA has not made any final determination. While UMTA has not yet taken final agency action on the pending (second) application, the plaintiffs need not await final action before this Court can entertain jurisdiction. A party need not await final agency decision if the preliminary agency action violates their statutory or constitutional rights, or if the prescribed agency procedure is inadequate to prevent irreparable injury. Fitzgerald v. Hampton, 467 F. 2d 755 (D.D.C. 1972); American Federation of Government Employees v. Resor, 442 F. 2d 993 (3rd Cir. 1971); Martinez v. Richardson, 472 F. 2d 1121 (10th Cir. 1973); Lugo v. Simon, 428 F. Supp. 28 (N.D. Ohio, 1976).¹⁷

17. And even where it has been deemed appropriate for the court to defer to the agency pending final agency adjudication, the Supreme Court has emphasized that the action should not be dismissed, but rather the court should stay its proceedings while retaining jurisdiction. Ricci v. Chicago Merchantile Exchange, 409 U.S. 289 (1973). Accord, MCI Communications Corp. v. American Telephone and Tel. Co., 496 F. 2d 214 (3rd Cir. 1974).

Here plaintiffs have alleged that UMTA's approval of the first application violated their statutory and constitutional rights. The federal defendants, before whom the application is currently pending, have denied that the plaintiffs have any private cause of action or any statutory or constitutional basis for relief and claim in this action that the transportation system need not be fully accessible to the mobility-handicapped. With this pre-conceived interpretation of plaintiffs' rights, and their erroneous approval of the first application, defendants currently are entertaining a second application which makes no provision at all for accessible buses for the mobility-handicapped [A. 104, 105, 118]. To force the plaintiffs to await final agency action - whenever that will be - on what is essentially a foregone conclusion is indeed an inadequate, futile process.¹⁸ The futility of awaiting final agency action is revealed by examining the pending application, which makes no provisions for the plaintiffs and other mobility-handicapped individuals;

18. Even if the plaintiffs' claims as to the second application were barred by the doctrine of primary jurisdiction, the lower court still had jurisdiction for purposes of plaintiffs' claims as to the first application. And although injunctive relief as to the first application may now be inappropriate, the plaintiffs still retained sufficient interests and injury as to justify an award of declaratory relief. See Super Tire Engineering Company v. McCorkle, 416 U.S. 115 (1974).

the vehicles to be purchased in connection with the pending application are identical to those approved by UMTA and purchased under the first application in not providing for handicapped individuals. The plaintiffs are faced with irreparable injury and a further prolonged denial of their right to accessible transportation. In fact, the pending application was submitted by the local defendants to UMTA more than a year-and-a-half ago. Surely plaintiffs should not have to wait and incur further protracted bureaucratic delay before they can commence litigation.

Moreover, two courts have recently held that the doctrines of primary jurisdiction and failure to exhaust administrative remedies are inapplicable in similar actions commenced by mobility-handicapped persons against local transit companies and UMTA. In Lloyd v. Regional Transportation Authority, supra, the Seventh Circuit rejected the defendants' claim that the plaintiffs needed to exhaust their administrative remedies before seeking judicial relief. "There being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies". Id., at 1287. Cf. Rosado v. Wyman, supra, at 405-406. Accord, Bartels v. Biernat, supra. Thus, the lower court erred in barring this action by reason of the doctrines of primary jurisdiction and failure to exhaust administrative remedies.

POINT III

THIS ACTION IS NOT BARRED BY THE DOCTRINE OF LACHES.

For reasons previously stated herein, there existed no administrative remedies which plaintiffs could have pursued prior to commencing this action. Consequently, the plaintiffs were not late or untimely in commencing this action and accordingly the doctrine of laches is inapplicable. Laches is an equitable remedy; in order to invoke the doctrine, defendants must demonstrate an inexcusable delay in the commencement of the action, and a resulting prejudice. While the defendants have alleged - though not proved - that they have been prejudiced, they have not asserted or claimed that there was an inexcusable delay in the plaintiffs' commencing the action. In fact, plaintiffs' attorneys wrote the local defendants prior to the date that the buses purchased under the first application were put in service, apprising them of plaintiffs' concerns with that application, requesting the cancellation of orders for inaccessible buses and the purchase of buses designed for the mobility-handicapped, and requesting that the defendants discuss the matter with plaintiffs' attorneys. While the defendants responded by indicating that they would contact the plaintiffs' attorneys, they never did so [A. 19, 20]. The plaintiffs clearly were never guilty of an inexcusable delay, but in fact commenced litigation only when they had no other remedies available to them.

Finally, the Fifth Circuit in Ecology Center of Louisiana v. Coleman, 515 F. 2d 860 (5th Cir. 1975), relying on the underlying rationale of Rule 56(c) of the Federal Rules of Civil Procedure, has warned that caution should be taken by the court before laches is applied on summary judgment where the facts have only been developed in affidavits and allegations. Consequently, the doctrine of laches is inapplicable to this case, and the lower court erred in summarily barring the plaintiffs' claims based on that doctrine.

POINT IV

SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHERE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.

Because there existed genuine issues of material fact in dispute, which could only be resolved by a trial on the merits, the district court improperly granted summary judgment in favor of the defendants. Rule 56(c) of the Federal Rules of Civil Procedures provides:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

This court has repeatedly held that summary judgment under Rule 56 is a drastic remedy and cannot be granted unless there is a clear showing that there are no genuine issues as to any material fact which remain for trial. Heyman v. Commerce and Industry Insurance Co., 524 F. 2d 1317 (2d Cir. 1975); Mintz v. Mathers Fund Inc., 463 F. 2d 495 (2d Cir. 1972); Judge v. City of Buffalo, 524 F. 2d 1321 (2d Cir. 1975); National Life Insurance Co. v. Solomon, 529 F. 2d 59 (2d Cir. 1975).

Moreover, it is well established that the function of the court on a summary judgment motion is not to try the facts on the affidavits and materials presented, but merely to ascertain whether a triable issue of material

fact remains. Heyman v. Commerce and Industry Insurance Co.,
supra; American Manufactures Mutual Ins. Co. v. American
Broadcasting-Paramount Theatres, Inc., 388 F. 2d 272 (2d Cir.
1967); Jaroslawicz v. Seedman, 528 F. 2d 727 (2d Cir. 1975).

On the record below, it is evident that the district court went beyond its appropriate function of ascertaining whether material facts were disputed, and engaged in a prohibited "trial by affidavit". Material issues disputed by the parties concerned such facts as:

- (1) the technological capability of manufacturing standard-size transit buses,
- (2) the claimed disruption of regular transit service and inconvenience to the general public if wheelchair-accessible vehicles were integrated into the fixed-route system;
- (3) defendants' intentional design of a transportation system structured to exclude mobility-handicapped persons;
- (4) the special efforts, if any, of the local defendants to provide a transportation system accessible to the mobility-handicapped;
- (5) the exclusion of handicapped individuals in transportation planning.

A resolution of all these facts is critical to the determination of the legal issues raised by the parties, and the existence of

these disputed facts precludes disposition by summary judgment.

On a motion for summary judgment, all inferences and ambiguities must be resolved in favor of the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654 (1962); Hill v. A-T-O Inc., 535 F. 2d 1349 (2d Cir. 1976); Rhoads v. McFerran, 517 F. 2d 66 (2d Cir. 1975); Sterling National Bank & Trust Co. of New York v. Fidelity Mortgage Investors, 510 F. 2d 870 (2d Cir. 1975). Despite the firm directive that the court's duty is to resolve any inference in favor of the plaintiffs, the district court here resolved these inferences in favor of the moving party.

This Court has previously held that summary judgment is particularly inappropriate to questions of motive and intent. Friedman v. Meyers, 482 F. 2d 435 (2d Cir. 1973); Cali v. Eastern Airlines, 442 F. 2d 65 (2d Cir. 1971). Here the district court improperly granted summary judgment where the disputed facts concerned the motive and intent of the local defendants in designing the transportation system which is inaccessible to mobility-handicapped passengers.

Additionally, summary judgment was improper because no adequate opportunity for developing the facts had been afforded through pre-trial discovery. National Life Ins. Co. v. Solomon, supra. In fact, the district court in its ex parte order, made prior to the filing of the summary

judgment motion, precluded plaintiffs from pursuing necessary discovery.

The granting of summary judgment in the instant case violates the principle that "[t]he party opposing summary judgment must be given a reasonable opportunity to gain access to proof, particularly where the facts are largely within the knowledge or control of the moving part". 6 Moore's Federal Practice ¶56.15[5] at 2397 (footnote omitted). Accord, Kirby v. Blackledge, 530 F. 2d 583, 585 (4th Cir. 1976); Illinois State Employees Union v. Lewis, 473 F. 2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973); Penn Galvanizing Co. v. Lukens Steel Company, 59 F.R.D. 74 (E.D. Pa. 1973); Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 53 F.R.D. 691 (S.D.N.Y. 1971); Smith-Corona Marchant, Inc. v. American Photocopy Equip. Co., 217 F. Supp. 39 (S.D.N.Y. 1963). As the court said in Illinois State Employees Union v. Lewis, supra, at 565:

"Nor should. . .[summary] judgment be entered until the party opposing the motions has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion".
(footnote omitted).¹⁹

19. Discovery is necessary to an inquiry of all the disputed issues of fact mentioned infra, p.35. For example, in order to evaluate the defendants' claim of "special efforts", it will be necessary for plaintiffs to learn crucial facts through discovery, including the results of any studies conducted by the local defendants concerning the demographic data and transportation needs of the handicapped population within the County, due alternative transportation designs, if any, considered, and the patterns of use of the Dial-A-Bus system by the handicapped.

Indeed, the lack of pretrial discovery by the opposing party has served as the basis for outright denial of a motion for summary judgment. In Smith-Corona Marchant, Inc. v. American Photocopy Equipment Company, supra, at 40, the court reasoned that

" . . . it would be premature and unwise to grant defendant's motion as long as pre-trial discovery remains unfinished. Great caution should be exercised in the granting of motions for summary judgment as decisions on the merits must abide a full appraisal of all the relevant facts and issues. Until the pre-trial phases of the case, and in particular pre-trial discovery are complete, such an appraisal cannot be made". (footnote omitted).

Here too, summary judgment was premature and plainly inappropriate.

CONCLUSION

For the foregoing reasons, the judgment of the district court, granting summary judgment to the defendants, should be reversed and remanded.

Respectfully Submitted,

PETER D. BRAUN, ESQ., of Counsel
MARIANNE ARTUSIO, ESQ., of Counsel
MONROE COUNTY LEGAL ASSISTANCE
CORPORATION
80 West Main Street
Rochester, New York 14614
Tel. No. (716) 325-2520
Attorneys for Plaintiffs-Appellants

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